company under section 268 of the Civil Procedure Code was a process in execution of the decree, and the consent order and payment into the hands of the sheriff in pursuance of it were made under the provisions of the same section 268; a section which occurs in the Chapter on Execution of Decrees, and must be admitted to relate to matters connected with such execution. It seems to me, therefore, that all the conditions with respect to the character of the fund to be dealt with, which are prescribed for the application of section 295, are here satisfied, and the moneys in the hands of the sheriff must be deemed to be subject to the provisions contained in that section."

Kay J. in the case of *In re Oxford Benefit Building and Investment Society*(4) said that "realized profits" must be taken in its ordinary commercial sense as meaning at least "profits tangible for the purpose of division". It would seem clear therefore that "realised" means converted into cash or into form whereby it becomes available for immediate distribution. In the present case it was only on the date of payment of the money into court that there was something available for immediate distribution, so that the appellant who had lodged his claim before that date was entitled to a rateable distribution.

I would allow this appeal, setting aside the order of the Senior Assistant Registrar and making an order that he do allow the appellant's claim to rateable distribution. There will also be an order for the respondents to pay costs of this appeal.

Ong C.J. and **Ong Hock Sim F.J.** concurred.

Appeal allowed.

Solicitors: *K. L. Devaser & Co.; Mah & Kok; Shook Lin & Bok.*

TAN HEE LOCK v. COMMISSIONER FOR FEDERAL CAPITAL & ORS.; HARIS BIN IDRIS v. COMMISSIONER FOR FEDERAL CAPITAL & ORS.

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.) March 2, 1973]

[Kuala Lumpur — Federal Court Civil Appeals Nos. 59 and 74 of 1972]

Administrative Law — Application for certiorari — Order of Federal Capital Commissioner — Joint application for recovery of possession by landlords of adjoining premises — Rules of natural justice — Right to be heard — Bias — Control of Rent Act, 1966, s. 18A — Federal Constitution, art. 8.

These were appeals from the dismissal of applications for *certiorari* in respect of the order of the Federal Capital Commissioner made under section 18A of the Control of Rent Act, 1966. On appeal it was submitted *inter alia* (a) that as the two premises were separately owned by each of the landlords, they could not make a joint application under section 18A of the Control of Rent Act, 1966, for the recovery of separate rent-controlled premises; (b) that the order of the Federal Capital Commissioner was invalid as it contravened Article 8 of the Constitution of Malaysia, as it discriminated against certain tenants of controlled premises in the Federal Capital; (c) the order of the Commissioner was made in contravention of the rule of *audi alteram partem* and therefore wrong in law; (d) the Commissioner in adjourning the proceedings and retiring to his chambers with his advisers who sat with him in the proceedings, violated the rule which required him to act openly, impartially and fairly.

Held, dismissing the appeal: (1) the joint application of the landlords was not bad in law and the Commissioner did not in any way act without jurisdiction;

(2) Article 8 of the Federal Constitution must be read as a whole and there was no discrimination in section 18A of the Control of Rent Act, 1966, against anyone on the ground of religion, race, descent or place of birth;

(3) in dealing with the application the Commissioner did not act in violation of the rules of natural justice, because he gave counsel for the tenants an opportunity to state their case. The proceedings before him were not in the nature of a trial in a court of law, so that it was within his power to adopt whatever procedure he considered suitable in order to make such inquiries as he thought fit;

(4) in consulting with his legal adviser and the other advisers, neither of whom was a party to the application or a witness, the Commissioner was not guilty of any bias.

Cases referred to:-

(1) *Mohamed Ashraff & Anor.* v. *The Commissioner for Federal Capital, K.L. & Anor.* [1972] 2 M.L.J. 69.

(2) *R.* v. *Gaming Board, ex parte Benaim* [1970] 2 Q.B. 417, 430.

(3) *R.* v. *Birmingham City Justice, ex parte Chris Foreign Foods (Wholesalers) Ltd.* [1970] 3 All E.R. 945.

FEDERAL COURT.

A. K. J. D'Cruz (*M. A. Gomez* with him) for the appellants in Civil Appeal No. 59 of 1972.

Dato S. P. Seenivasagam for appellants in Civil Appeal No. 74 of 1972.

Chan Siew Yoon for first respondent.

N. A. Marjoribanks for second and third respondents.

Gill F.J.: These two appeals, which were heard together by consent of the parties, are appeals from the dismissal by Abdul Hamid J. of the two separate applications of the appellants for an order of *certiorari* to remove into the High Court to be quashed an order of the Federal Capital Commissioner, the first respondent, requiring them within six months from the date of the order to deliver vacant possession of the rent controlled premises of which they are the respective tenants.

The appellant in the first appeal and the two appellants in the second appeal are the tenants respectively of the adjacent premises known as No. 87 and No. 89, Jalan Tuanku Abdul Rahman, Kuala Lumpur, of which the third and second respondents respectively are the landlords.

The order sought to be quashed was made by the Commissioner under section 18A of the Control of Rent Act, 1966 on the joint application of the two landlords who, with a view to constructing a 4-storey office/shop building on the site of the two adjacent premises, had entered into an agreement in writing on October 13, 1969 to become joint owners of the two premises.

The joint application by the landlords was made on November 19, 1970. It was accompanied, as required by section 18A (1) of the Act, by —

(a) a planning permission which had been granted to them by the appropriate Planning Authority;

(b) evidence that funds would be available for the purpose of putting into effect the proposed development of the premises;

(c) a written undertaking by them as landlords to commence development within six months of the date when possession of the premises shall have been obtained.

Copies of the application were served on the appellants on January 29, 1971.

At a meeting held by the Commissioner on February 4, 1971 in connection with the landlords' application, counsel for the tenants argued that a formal inquiry should be held so that they could call witnesses or call evidence of rebuttal and cross-examine the second and third respondents in order to challenge their statements in their application. In order to make a ruling on that submission, the Commissioner postponed the meeting until February 10, 1971.

When the meeting was reconvened on February 10, 1971, counsel for the appellants again made an application, this time in writing, for a formal inquiry. The Commissioner ruled that no formal inquiry was necessary under section 18A, but invited counsel to challenge the evidence and to make submissions on the requirements of section 18A. Both counsel accepted the invitation and raised a number of points both on law and on facts. Having considered all the points raised, the first respondent made the order in question on February 13, 1971.

As I have said, the appellants made separate applications to the High Court to have the order of the Commissioner quashed. Their applications were heard separately, but counsel for the applicants in the second application adopted the grounds of application of counsel for the applicant in the first application. The same counsel argued the appeals before us, and their grounds of appeal are the same as the grounds in support of their applications in the court below.

In support of the applications for *certiorari* in the court below, it was submitted that, as the two premises were separately owned by each of the landlords, they could not make a joint application under section 18A of the Act for the recovery of possession of separate rent controlled premises. The learned judge found no merit in that submission and went on to say:

"Apart from the fact that there is nothing in the Act which prohibits two separate owners who desire to jointly develop their separate properties from making a joint application, it is apparent that in this particular case, the landlords had by this time concluded a written agreement to transfer half share in the respective premises to each other for the purpose of creating joint ownership of the premises in question."

The ground of appeal here on that point is that the application by the landlords was bad in law because it was an application for one structure on two different pieces of land belonging to two different owners, one of whom was a legal owner and the other was not, there being merely a contract between them as regards the consolidation of the two buildings. I regret to say, with all respect to counsel, that I find this reasoning incomprehensible, because each of the landlords is in fact the legal owner of his own premises. This was not a case of one legal owner agreeing to sell his own property to the legal owner of the other property. Their avowed object was to consolidate the two properties with a view to constructing thereon a bigger building of which they would become joint owners in undivided equal shares. There was obviously no point in their taking the necessary steps to have their lands consolidated before they had obtained vacant possession so as to clear the way for the proposed development. Their joint application was tantamount to an application by each of them for the recovery of possession of his own separate property, so that there was nothing irregular about it. It is true that there is no express provision in the Act for a joint application by owners of two adjacent premises, but what is there against it? Nothing. I need hardly add that in the event of two joint owners of adjoining premises making separate applications with a view to joint development of their combined properties, the Commissioner normally would, and indeed should, hear them together.

The next ground of appeal is that the evidence relied on by the Commissioner as regards the sufficiency of funds which were available or would be available for the proposed development was of no probative value, because the letter produced by the landlords from the Oversea Chinese Banking Corporation, Seremban stating the financial standing of the applicants was written "without any responsibility". It is also said that there was no evidence as to the authenticity of the writer of the document or the document itself, and in any event the statements in the document were couched in such equivocal terms that no reasonable man could attach any weight to them.

I can find no substance in any of these assertions. The tenants knew all along what the document in support of the application was. It was open to them to make such enquiries as they deemed fit to check its authenticity. As far as the Commissioner was concerned, if he was satisfied with the evidence produced, that was the end of the matter. The Commissioner in his affidavit has stated that he considered carefully the report of the Seremban Branch of the Oversea Chinese Banking Corporation and the two deposit receipts and was satisfied that the second and third respondents would have more than sufficient funds for putting into effect the proposed development. It is true that no charge had yet been created over the two properties, but in view of the considerable amount of legal costs and fees involved in the preparation of a charge, it would have been unwise for the landlords to have created a charge before the order for possession had been obtained.

As regards the undertaking given by the landlords, it is said that it was not a valid undertaking in law in that one person who is not the landlord at the material time of the premises owned by another purported to give an undertaking that building work would be commenced on the premises of which he was not the owner. With all deference to the learned counsel, this is nothing but a repetition of the first ground that the joint application by the landlords was

bad in law. I must therefore hold that the Commissioner was right in accepting the undertaking. After all the undertaking was a joint undertaking by the two landlords in respect of a proposed joint development.

Another ground of appeal is that the order of the Federal Capital Commissioner dated 13th February, 1971 cannot stand as the same is void and ineffective in view of the fact that section 18A of the Control of Rent Act, 1966 violates Article 8 of the Constitution of Malaysia in that the said section contains provisions which discriminate against a section of a class of people, to wit, tenants of controlled premises in the Federal Capital, from the whole of the class of people identified generally as tenants of controlled premises in Malaysia.

This question of violation of Article 8 was not pursued in the court below. In any event, an answer to it is to be found in the judgment of Ong C.J. (Malaya) in *Mohamed Ashraff & Anor.* v. *The Commissioner for Federal Capital, Kuala Lumpur & Anor.*,[1] with which I respectfully agree, where he said:

"Rent control has for several decades seriously encroached upon the common law rights of landlords. In the public interest Parliament had thought fit to put shackles upon the rights of the landlord of controlled premises to deal with his property as he deems fit. Decontrol is nothing more than a measure to restore those rights to their pristine fullness. Section 18A is clearly one of those measures."

As was pointed out by counsel for the first respondent, Article 8 of the Constitution should be read as a whole. Bearing the provisions of that Article in mind, I can find no discrimination in section 18A of the Act against any one on ground of religion, race, descent or place of birth.

The major ground of appeal is that the rule of natural justice known as *audi alteram partem* is applicable to an application under section 18A of the Act, so that the order of the Commissioner, which was made in contravention of that rule, is wrong in law. The learned judge in the court below rejected this ground in view of the judgment of this court in *Mohamed Ashraff & Anor.* v. *The Commissioner for Federal Capital & Anor.* in which it was said (at page 71):

"We are also in agreement with the Chief Justice that section 18A leaves no discretion with the Commissioner upon proof of compliance with section 18A(1) (a) (b) and (c) already quoted in his judgment. In the absence of any provision as to the mode of inquiry, we are of the view that no question of failure to observe the principles of natural justice can arise. The Commissioner's functions under section 18A appear to us to be purely administrative and any act pursuant thereto is not amenable to *certiorari*."

It is submitted that assuming for the sake of argument that in deciding an application under section 18A of the Act the Commissioner was performing a purely administrative act, even then, in view of the serious consequences arising therefrom, it was necessary for him to have followed the principles of natural justice. The authority relied on for this submission is the following passage from the judgment of Lord Denning in *Reg.* v. *Gaming Board, Ex p. Benaim*:[2]

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter: see what Tucker L.J. said in *Russell* v. *Norfolk (Duke of)* [1949] 1 All E.R. 109, 118 and Lord Upjohn in *Durayappah* v. *Fernando* [1967] 2 A.C. 337, 349. At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge* v. *Baldwin* [1964] A.C. 40. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. *Reg.* v. *Metropolitan Police Commissioner, Ex parte Parker* [1953] 1 W.L.R. 1150 and *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 are no longer authority for any such proposition. See what Lord Reid and Lord Hodson said about them in *Ridge* v. *Baldwin* [1964] A.C. 40, 77-79, 133."

It is further submitted that section 18A requires the Commissioner to hold an inquiry before making or refusing to make an order.

It is clear from the authorities that natural justice does not mean that a person performing an administrative or ministerial act must follow the procedure of a court of law or adopt procedure analogous to that of a court of law. I do not think I can accept the submission that section 18A (2) of the Act requires the Commissioner to hold any formal inquiry. What the section says is that the Commissioner shall "after making such enquiries as he thinks fit, consider such applications and make an order or refuse to make an order.". To make enquiries, to my mind, does not mean to hold a formal inquiry. The only duty of the Commissioner is to see that the application conforms to the requirements of section 18A of the Act.

Even assuming that the principles of natural justice apply to the Commissioner's deliberations under section 18A, I do not think there was any violation of them in this case. As I have already said, the Commissioner invited counsel for the tenants to challenge the evidence and to make submissions on the requirements of section 18A. They raised various points, but the Commissioner obviously did not think much of them. There could have been no arguments against the planning permission submitted by the landlords with their application. I do not see how the written undertaking by the landlords that work for the purpose of putting into effect their proposed development would commence within six months of the date of possession could be questioned. That left only the evidence as regards availability of funds. To satisfy that requirement, the landlords produced evidence of their financial standing, with which the Commissioner was satisfied. They were going to charge their property to the bank in order to raise the necessary funds. It would have been futile for them to have done so before obtaining the order of possession. Once the three conditions laid down in section 13A (1) were complied with to the satisfaction of the Commissioner, he had no discretion but to make the order which he made.

The last ground of appeal is that the Commissioner, in adjourning the proceedings on February 10, 1971 and retiring into his chambers with his advisers who sat with him in the proceedings, violated the rule which required him to act openly, impartially and fairly. This ground has been raised on the authority of *R.* v. *Birmingham City Justice, ex parte Chris Foreign*

Foods (Wholesalers) Ltd.[3] In my judgment that case has no application to this case, as the facts there were different. The two persons who retired with the Commissioner in this case were not parties to the application, nor were they witnesses. The Commissioner's position here was the same as that of lay justices in England who have to be assisted by their clerks on points of law.

To sum up, the joint application of the landlords was not bad in law. The Commissioner did not in any way act without jurisdiction. In dealing with the application he did not act in violation of the rules of natural justice, because he gave counsel for the tenants an opportunity to state their case. The proceedings before him were not in the nature of a trial in a court of law, so that it was within his power to adopt whatever procedure he considered suitable in order to make such enquiries as he thought fit. In consulting with his legal adviser and the other adviser, neither of whom was a party to the application or a witness, the Commissioner was not guilty of any bias.

I would therefore dismiss these appeals with costs.

Ong C.J. and **Ong Hock Sim F.J.** concurred.

Appeal dismissed.

Solicitors: *A. K. J. D'Cruz & Co.; S. Seenivasagam & Sons; Shook Lin & Bok; Lovelace & Hastings.*

LIM SIEW LEONG & ANOR. v. VALLIPURAM

[F.C. (Azmi L.P., Suffian Ag.C.J. (Malaya) and Gill F.J.) March 2, 1973]

[Johore Bahru — Federal Court Civil Appeal No. 87 of 1972]

Land Law — Agreement for sale of land — Land mortgaged to bank after signing contract — Death of vendor — Persons appointed to represent estate of vendor — Grant of probate not extracted — Action for specific performance and damages — Whether plaintiff can ask for an order for damages.

The respondent had entered into an agreement with one Lim Sian Soon, whereby the latter agreed to sell a portion of his land to the respondent. Lim Sian Soon subsequently mortgaged the whole of his land to a bank. The respondent thereupon brought an action for specific performance and damages. While the action was pending, Lim Sian Soon died and the appellants were appointed to represent the estate and were substituted as defendants in the action. Probate had however not been granted to the appellants. The respondent took out a notice of motion for judgment and the learned judge made an order for damages for breach of contract against the appellants. The appellants thereupon appealed to the Federal Court.

Held: (1) the respondent in the present case had clearly elected to treat the contract as in force notwithstanding the appellant's default and therefore the claim for damages was not sustainable as an independent claim;

(2) the appeal must therefore be allowed and an order by way of specific performance made to require the appellants eventually to transfer the portion of the land to the respondents.

Cases referred to:-

(1) *Ramakrishnanayya* v. *Sreeramalu* A.I.R. 1939 Madras 546.

(2) *Thrope* v. *Fasey* [1949] 1 Ch.D. 649.

(3) *Mama* v. *Sassoon* A.I.R. 1928 P.C. 208; 111 I.C. 413.

(4) *Lee Hoy & Anor.* v. *Chen Chi* [1971] 1 M.L.J. 76.

FEDERAL COURT.

Thara Singh Sidhu for the appellants.

S. G. Thakurta for the respondent.

Gill F.J.: By an agreement dated April 20, 1962 one Lim Sian Soon agreed to sell free from all encumbrances a portion of his land known as Holding 143 at Banda Hilir in the township of Malacca for a sum of $5,000 to C. Vallipuram, the respondent to this appeal and plaintiff in the action from which the appeal has arisen. A sum of $3,000 was paid as deposit towards the purchase price on the signing of the agreement. The balance was to be paid upon the land being subdivided to enable the vendor to convey to the plaintiff as purchaser the area agreed to be sold.

On the strength of the agreement and in good faith the plaintiff built a dwelling house on the area as delineated in the plan annexed to the sale agreement, and he has been and still is in occupation of the dwelling house on the said piece of land by his servant or agent or by his tenant.

Notwithstanding the sale agreement and the occupation by the plaintiff of the portion of land as aforesaid, Lim Sian Soon charged his land to Bank Bumiputra Malaysia Berhad in or about October, 1967. By his solicitors' letters dated November 16, 1968 and February 15, 1969 to Lim Sian Soon and Bank Bumiputra respectively, the plaintiff requested them to perform the obligations contained in the said agreement. On April 7, 1969 Lim Sian Soon's solicitors wrote back to the plaintiff's solicitors to say that arrangements were then being made to discharge the charge in favour of Bank Bumiputra, that their client would make the relevant application for subdivision of his land and for the issue of new titles in respect of such subdivided parts, and that on obtaining fresh titles and when the balance of the purchase price was paid he would transfer the land to the plaintiff.

There was no further correspondence between the parties, but the vendor having taken no steps to complete the sale, the plaintiff issued a writ on March 11, 1970 against Lim Sian Soon and Bank Bumiputra Malaysia Berhad as the first and second defendants respectively, claiming against both defendants specific performance of the agreement and damages in lieu of or in addition to specific performance. His claim in the alternative against the first defendant was for damages for breach of contract or alternatively or in addition recission of the said contract and repayment to the plaintiff of the deposit of $3,000 together with interest. As against the second defendants as the registered chargees of the first defendant's land, the plaintiff claimed a declaration that they were trustees of the portion of the land in question for the plaintiff.

The first defendant entered an appearance on March 21, 1970, but he took no steps to file his defence. On May 7, 1970 the plaintiff took out a summons for directions for an order that notwithstanding the refusal of the first defendant to file his defence the action be set down for trial. In his affidavit in opposition to the summons for directions, the